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TAN KIM HOR & ORS

v.

TAN HENG CHEW & ORS

b

COURT OF APPEAL, KUALA LUMPUR

ABDUL HAMID MOHAMAD JCA

RICHARD MALANJUM JCA

ARIFIN ZAKARIA JCA

[CIVIL APPEAL NO: W-03-45-01]

29 JANUARY 2003

c

COMPANY LAW: *Winding up - Just and equitable rule - Application to strike out petition - Company comprising family members - Proper approach - Whether to give due considerations to personal character of relationship between parties - Whether to avoid trial by affidavits - Striking out petition by way of O. 18 r. 19 Rules of the High Court 1980 - Whether undesirable - Companies Act 1965, s. 218(1)(i) - Rules of the High Court 1980, O. 18 r. 19 (1)(a), (b) & (d)*

*d**e*

CIVIL PROCEDURE: *Striking out - Winding up petition - Striking out petition under O. 18 r. 19 Rules of the High Court 1980 - Whether undesirable - Whether to be resorted to in plain and obvious cases - Rules of the High Court 1980, O. 18 r. 19(1)(a), (b) & (d) - Companies Act 1965, s. 218(1)(i)*

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The parties herein were members of two families who together owned, controlled and managed the 9th respondent company, Tan Chong Consolidated Sdn Bhd ('the company'). The company in turn is the controlling shareholder in several companies, including a few public listed companies ('Tan Chong Group'). The facts showed that the first petitioner's family owned about 44.6% of the company's shares whilst the first respondent's family held the balance 55.4%.

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Following misunderstandings that arose between the two families regarding, *inter alia*, a de-merger exercise within the Tan Chong Group, the petitioners applied to wind up the company ('the petition') pursuant to s. 218(1)(i) Companies Act 1965 ('the Act'). The respondents were however opposed to the move, and in the circumstances, applied to set aside the petition under O. 18 r. 19(1)(a),

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(b) or (d) Rules of the High Court 1980 ('RHC'). Before the learned judge, the petitioners argued that the two families had suffered from a breakdown of mutual trust and confidence and that it was therefore just and equitable that the company be wound up. The argument, however, was rejected by the learned judge who ruled, *inter alia*, that: (i) the real intention of the petition was to

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avoid the family of the 1st petitioner from being sidelined in the 'Tan Chong

scheme of things'; (ii) the petition was premised upon a desire to unlock the petitioners' minority position in the company; (iii) the petition was vitiated by bad faith and was motivated by self-interest and self-preservation; (iv) the 1st respondent was acting within the legitimate confines of managing a company and had not exceeded his powers; (v) the petitioners, by stressing that they had no problem working with the respondents, had contradicted themselves; and (vi) the petition was an abuse of process. Upon these findings, and after dismissing the petitioners' preliminary objection as to the appropriateness of the respondents proceeding by way of O. 18 r. 19 RHC, the learned judge concluded that there was no just and equitable ground to wind up the company and hence, set aside the petition. The petitioners appealed and before the learned appellate judges questions arose as to: (i) whether it was an abuse of process to have applied to strike out a petition under s. 218 of the Act by way of O. 18 r. 19 RHC; (ii) whether there was any basis for the petition to wind up the company on just and equitable ground; and (iii) whether the learned judge was correct in striking out the petition on the basis as given.

Held:**Per Richard Malanjum JCA**

- [1] An application made pursuant to O. 18 r. 19 RHC to strike out a petition presented under s. 218 of the Act is undesirable and should be discouraged, as such procedure would only delay the adjudication of the matter. This is not however to say that it is totally inapplicable, as the Order could be resorted to in cases where the petition is obviously unsustainable. (p 647 d)
- [2] Our courts have the inherent jurisdiction at common law to strike out the petition. That being so, the failure of the learned judge to indicate the source of the court's jurisdiction in striking out the petition is not *ipso facto* sufficient ground to reverse her decision. Such shortcoming in the judgment is similar to a failure to cite the relevant provisions of law or rules. (p 647 g)
- [3] The findings of facts by the learned judge were findings that represented her own perceptions of the situation and probably were arrived at upon a literal reading of the exhibits annexed to the affidavits without the benefit of probable explanations from the contending parties. (p 650 b)
- [3a] It was the learned judge's own conclusion that the petitioners were afraid of being sidelined in the affairs of the Tan Chong Group. In so concluding, however, the point was missed that it was the petitioners' assertion that the management was once on a consensus basis. Clearly,

- a* this issue should rightly be put to the petitioners during the trial proper and not for the learned judge to assume or infer at the interlocutory stage. It was erroneous too of the learned judge to have concluded that the real intention of the petitioners was to unlock their minority position. Obviously such conclusion was derived from the content of paragraph
- b* 103 of the petition. However, the paragraph should not be read in isolation since there was an earlier assertion, which the respondents disputed, as to how the 5% stake went to the late Tan Sri Tan Yuet Foh. Considering the conflict, it was inappropriate and indeed premature for the court below to make any finding or conclusion the way it did. (p 650 b-d)
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- d* [3b] The learned judge had also not pointed out to any part of the petition or affidavits, which she found to have failed to satisfy the requirements of the ‘just and equitable’ principle. And no basis was given for her finding of ‘feeling fermented’ within the 1st petitioner. Further, no reason was given as to why and how she came to the conclusion that the motive for filing the petition was not to redress the alleged wrongs but for other reasons best known to the 1st petitioner. As to the finding that the 1st petitioner was slighted, it was obviously her own assumption since there was no statement from the 1st petitioner that that was the case. And purely on her conclusion that there existed no real breakdown of trust and understanding, she went to conclude that it was for self-preservation and self-interest that the petition was filed. Substantially, the approach of the court below was to justify a finding by another finding which itself was vague of any evidential basis. (pp 650 e-h & 651 a-e)
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- f* [4] Generally courts are more inclined to characterize companies comprising family members as belonging to the *Ebrahimi*’s (*Ebrahimi v. Westbourne Galleries Ltd*) type of companies where the articles of association are not exhaustive or not fully reflective of the terms in the relationship or understanding between the parties. In such cases, the courts will invariably
- g* subject the exercise of legal rights to equitable considerations so as to give effect to the considerations of personal character between the parties. And yet the learned judge took the view that ‘the 1st petitioner’s maudlin preoccupation with tradition and remembrance of things past gets in the way of the practical, pragmatic corporate governance of the day’. There
- h* was clearly a failure by the court below to consider the true nature or characteristic of the company before making such a finding. (pp 651 e-h & 652 a-c)
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- [5] The learned judge has fallen into error when she deemed it unnecessary to enquire if there could be any explanation for the apparent contradictions in the stance of the petitioners. This was an inappropriate approach to adopt. Surely the petitioners should be allowed to present their side of the story and to offer explanation where required. (p 652 g-h) a
- [6] It was premature or presumptuous to make the findings, conclusions and inferences as the court below did when it was only at an interlocutory stage. The approach was tantamount to conducting a trial by affidavits, which should not be the case, as the principles upon which the court acts in exercising its power under O. 18 r. 19 RHC are well settled. It is only in plain and obvious cases that recourse should be had to the summary process. It cannot be exercised by a minute examination of the documents and facts of the case, in order to see whether the party has a cause of action or a defence. (p 653 a-g) b
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[Appeal allowed; petition to be heard by another judge.] d

[Bahasa Malaysia Translation Of Headnotes

Pihak-pihak di sini adalah ahli kepada dua keluarga yang secara bersesama memiliki, mengawal dan mengurus responden ke-9, Tan Chong Consolidated Sdn Bhd ('syarikat'). Syarikat pula adalah pemegang saham terbesar dalam beberapa syarikat lain termasuk syarikat-syarikat awam yang tersenarai di bursa saham ('Kumpulan Tan Chong'). Fakta menunjukkan bahawa keluarga pempetisyen pertama memiliki 44.6% saham dalam syarikat sementara baki 55.4% dimiliki oleh keluarga responden pertama. e

Ekoran salah faham yang timbul di antara kedua keluarga, antara lain berkaitan usaha untuk merombak Kumpulan Tan Chong, pempetisyen memohon untuk menggulung syarikat ('petisyen') berdasarkan peruntukan s. 218(1)(i) Akta Syarikat 1965 ('Akta'). Responden tidak bersetuju dengan tindakan pempetisyen, dan dengan itu memfail permohonan bagi menetepikan petisyen di bawah A. 18 k. 19(1)(a), (b) & (d) Kaedah-kaedah Mahkamah Tinggi 1980 ('KMT'). Di hadapan hakim yang bijaksana, pempetisyen berhujah bahawa keadaan saling mempercayai dan meyakini sudah tidak wujud di antara kedua-dua keluarga dan dengan itu adalah adil dan saksama bahawa syarikat digulungkan. Hujah pempetisyen bagaimanapun ditolak oleh hakim yang bijaksana yang merumuskan, antara lain, bahawa: (i) tujuan sebenar petisyen adalah untuk mengelak keluarga pempetisyen pertama dari menjadi tersisih dari 'hal ehwal Kumpulan Tan Chong'; (ii) petisyen diasaskan kepada keinginan untuk melepaskan pempetisyen dari kedudukan minoriti mereka di dalam syarikat; (iii) f

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- a* petisyen berniat jahat dan bermotifkan kepentingan diri; (iv) responden pertama telah bertindak dalam lingkungan sah pengurusan sesebuah syarikat dan tidak menyalahguna kuasanya; (v) pempetisyen telah menyanggahi pendirian mereka sendiri apabila menyatakan bahawa mereka tiada masaalah bekerja bersama responden; dan (vi) petisyen merupakan satu salahguna proses. Atas dapatan-
- b* dapatan ini, dan setelah menolak bantahan awal pempetisyen tentang keteraturan permohonan responden melalui prosedur A. 18 k. 19 KMT, hakim yang bijaksana memutuskan bahawa tidak terdapat alasan adil dan saksama bagi menggulung syarikat dan dengan itu, mengetepikan petisyen. Pempetisyen merayu dan di hadapan hakim-hakim rayuan yang bijaksana telah berbangkit isu-isu:
- c* (i) Sama ada ianya satu salah guna proses bagi mengetepikan petisyen dibawah s. 218 Akta melalui prosedur A. 18 k. 19 KMT; (ii) sama ada terdapat asas untuk pempetisyen penggulungan syarikat atas alasan adil dan saksama; (iii) sama ada hakim bijaksana betul dalam mengetepikan petisyen atas alasan-alasan yang dikemukakan beliau.
- d* **Diputuskan:**
Oleh Richard Malanjum HMR
- e* [1] Suatu permohonan yang dibuat di bawah A. 18 k. 19 KMT bagi mengetepikan petisyen di bawah s. 218 Akta adalah kurang disenangi dan tidak harus digalakkan, kerana ianya hanya melengahkan pemutusan halperkara. Ini bagaimanapun tidak bermakna bahawa prosedur sebegitu harus ditolak bulat-bulat. Aturan berkenaan masih boleh digunakan dalam kes-kes di mana petisyen adalah secara jelas dan nyata tidak dapat dipertahankan.
- f* [2] Mahkamah kita mempunyai bidangkuasa di sisi *common law* untuk mengetepikan petisyen. Oleh yang demikian, kegagalan hakim bicara mengenalpasti sumber bidangkuasa apabila mengetepikan petisyen tidaklah *ipso facto* menjadi sebab yang mencukupi untuk menolak keputusan beliau. Kelemahan sedemikian samalah seperti gagal menyatakan peruntukan undang-undang atau peraturan sahaja.
- g* [3] Rumusan-rumusan fakta seperti yang dibuat oleh hakim bijaksana adalah rumusan yang melambangkan pandangan beliau terhadap situasi dihadapannya dan kemungkinan dibuat atas penelitian eksibit-eksibit yang dikepilkan kepada affidavit-afidavit tanpa manfaat apa-apa penjelasan yang mungkin diberi oleh pihak-pihak terlibat.
- h* [3a] Ianya adalah konklusi hakim bijaksana sendiri bahawa pempetisyen takut disisih dari halehwal Kumpulan Tan Chong. Bagaimanapun, dalam mencapai konklusi tersebut, beliau telah mengabai hujah pempetisyen
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bahawa pengurusan sebelumnya berjalan atas dasar kesepakatan. Sepatutnya isu ini dihadapkan kepada pempetisyen sewaktu perbicaraan sebenar dan bukan untuk di buat andaian oleh hakim bijaksana di peringkat permohonan interlokutori. Ianya juga silap bagi hakim bijaksana untuk merumuskan bahawa tujuan sebenar pempetisyen adalah untuk membebaskan diri dari kedudukan minoriti mereka. Rumusan tersebut jelas dibuat berdasarkan kandungan perenggan 103 petisyen. Tetapi perenggan ini tidak wajar dibaca berasingan, kerana terdapat pengataan sebelumnya, yang dibantah oleh responden, tentang bagaimana kepentingan 5% telah berpindah kepada Tan Sri Tan Yuet Foh. Mengambil kira konflik sedemikian, ianya tidak teratur malah pramatang bagi mahkamah di bawah membuat rumusan sepertimana yang dibuatnya.

[3b] Hakim yang bijaksana juga tidak mengenalpasti mana-mana bahagian petisyen atau affidavit yang dikatakan gagal memenuhi keperluan prinsip 'just and equitable'. Begitu juga, tiada alasan diberikan bagi dapatan bahawa pempetisyen pertama telah dipengaruhi 'perasaan hasad'. Selanjutnya, tidak dijelaskan kenapa dan bagaimana beliau berpendapat bahawa tujuan pemfailan petisyen bukanlah untuk menyelesaikan kesilapan tetapi disebabkan motif-motif lain yang hanya diketahui oleh pempetisyen pertama. Berhubung pandangan bahawa pempetisyen pertama merasa terhina, ianya semata-mata andaian beliau kerana pempetisyen pertama tidak pernah pun berkata begitu. Dan semata-mata atas andaian beliau sendiri bahawa sebenarnya tidak wujud keruntuhan kepercayaan dan kesefahaman, beliau merumuskan bahawa petisyen difailkan atas dasar kepentingan diri. Pada intinya, pendekatan yang diambil oleh mahkamah di bawah adalah menjustifikasikan suatu rumusan dengan rumusan lain walaupun ianya tidak mempunyai sebarang asas keterangan.

[4] Mahkamah umumnya condong kepada mencirikan syarikat-syarikat milik keluarga sebagai tergulung kepada syarikat jenis *Ebrahimi* (*Ebrahimi v Westbourne Galleries Ltd*) di mana perkara-perkara persatuan bukanlah cermin sebenar akan terma-terma yang mengawal hubung atau kefahaman di antara pihak-pihak. Dalam keadaan sedemikian mahkamah, tidak dapat tidak, akan mentaklukkan pelaksanaan hak-hak perundangan kepada pertimbangan-pertimbangan ekuiti bagi memberi kesan kepada kaitan-kaitan keperibadian yang wujud di antara pihak-pihak. Walaupun begitu, hakim yang bijaksana berpendapat bahawa 'ketaksuban pempetisyen kepada tradisi dan memori-memori lampau menjadi penghalang kepada pengurusan korporat terkini yang praktikal dan pragmatik', dan dalam mencapai rumusan ini, telah gagal mempertimbang sifat dan ciri sebenar syarikat.

- a** [5] Hakim yang bijaksana telah silap bilamana menganggapnya tidak perlu untuk menyoal sama ada wujud apa-apa penjelasan terhadap kontradiksi yang dikatakan wujud pada pendirian pempetisyen. Ini adalah pendekatan yang tidak teratur. Tentunya pempetisyen harus dibenarkan untuk mengemukakan pendirian mereka dan memberikan penerangan di mana perlu.
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- c** [6] Ianya adalah pramatang atau bersifat andaian untuk membuat rumusan, konklusi dan inferens pada peringkat interlokutori sepertimana yang dibuat oleh mahkamah di bawah. Pendekatan sedemikian menjadikannya suatu perbicaraan melalui afidavit, yang mana ianya tidak harus berlaku, memandangkan prinsip-prinsip di atas mana mahkamah bertindak dalam melaksanakan kuasanya di bawah A. 18 k. 19 KMT sudah pun jelas. Proses terus seperti di bawah kaedah ini hanya harus dipakai kepada kes-kes yang jelas dan terang sahaja. Ia tidak boleh dilaksanakan melalui pemeriksaan secara halus dokumen-dokumen dan fakta, untuk melihat sama ada sesuatu pihak itu mempunyai kausa tindakan ataupun pembelaan.
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Rayuan dibenarkan; petisyen hendaklah dibicarakan di hadapan hakim yang lain.]

- e** **Case(s) referred to:**
Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC (**refd**)
Bank Negara Malaysia v. Mohd Ismail & Ors [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14 SC (**refd**)
Buildcon-Cimaco Concrete Sdn Bhd v. Filotek Trading Sdn Bhd [1999] 4 CLJ 135 HC (**refd**)
- f** *Dato' Ibrahim Hj Ismail & Anor v. Onstream Marine Sdn Bhd & Ors* [1998] 4 CLJ 526 HC (**refd**)
Ebrahimi v. Westbourne Galleries Ltd [1973] AC 360 (**refd**)
Eng Mee Yong & Ors v. Letchumanan [1979] 2 MLJ 212 (**refd**)
- g** *Fairview Schools Bhd v. Indrani Rajaratnam & Ors* CA [1998] 1 CLJ 285 (**refd**)
Maril-Rionebel (M) Sdn Bhd & Anor v. Perdana Merchant Bankers Bhd & Other Appeals [2001] 3 CLJ 248 CA (**refd**)
Megat Najmuddin Dato' Seri (Dr) Megat Khas v. Bank Bumiputra Malaysia Bhd [2002] 1 CLJ 645 FC (**refd**)
Re Saul D Harrison & Sons Plc [1995] 1 BCLC 14 (**refd**)
- h** *Sugumar Balakrishnan v. Pengarah Imigresen Negeri Sabah* [1998] 3 CLJ 85 CA (**refd**)
Tuan Hj Ishak v. Leong Hup Holdings Bhd [1996] 1 CLJ 393 CA (**refd**)

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Legislation referred to:

Companies Act 1965, s. 218(1)(i)

Rules of the High Court 1980, O. 18 r. 19(1)(a), (b), (d)

For the appellants/petitioners - Cecil Abraham (Dato' Mohd Shafee Abdullah, Dhinesh Bhaskaran, Azahar Azizan Harun, Walter Prereira & Yee Mei Ken); M/s Kamarudin & Partners

For the respondents - Lim Kian Leong (Low Chi Cheng, Neela Iadurey & SM Sia); M/s Lim Kian Leong & Co

[Appeal from High Court, Kuala Lumpur; Companies Winding Up Petition No: D2-28-507-2001]

Reported by WA Sharif

JUDGMENT**Richard Malanjum JCA:****Introduction**

This is an appeal by the appellants (the petitioners in the court below and hereinafter referred to as 'the petitioners') against the decision of the High Court rendered on 9 October 2001 striking out their petition (as amended) on the application by the respondents (the respondents in the court below and hereinafter referred to as 'the respondents'). The main relief sought for in the petition is for an order to wind up the 9th respondent herein on the ground that it is just and equitable pursuant to s. 218(1)(i) of the Companies Act 1965 (the Act).

The petition was filed on 21 May 2001 and fixed for hearing on 16 August 2001. Affidavits in support of the petition as well as in opposition were also filed. And in the interim the respondents by a notice of motion dated 15 June 2001 applied for the order to strike out the petition pursuant to O. 18 r. 19(1)(a), (b) or (d) of the Rules of the High Court 1980 (the RHC) and/or under the inherent jurisdiction of the court on the ground that it was an abuse of process of the court. Meanwhile on 18 July 2001 the petitioners obtained an order to amend the petition.

The hearing of the notice of motion was fixed on 27 July 2001 with the end result as alluded to hereinabove.

The Background Facts

From the petition as amended and the several affidavits filed by the contesting parties some undisputed facts can be discerned. They have been set out in chronological order by the court below. Hence it will suffice if the gist is reproduced herein as follows:

- a* 1. Tan Chong & Co was founded in the early 1930s by the patriarch Tan Chong as a sole proprietorship.
- b* 2. In 1946 or thereabout a partnership of Tan Chong & Co. (TC & Co.) was founded with the partners being the late Tan Chong and his two sons, namely the 1st petitioner and his brother the late Tan Sri Tan Yuet Foh, the father of the 1st respondent. The business was in food supply.
- c* 3. Over the years the business of the partnership flourished and the brothers saw an opportunity in the automobile business. The end result was that the partnership became the distributor for Nissan and Datsun cars in addition to the then existing business of food supply.
- d* 4. On 16 February 1959 Tan Chong & Sons Motor Company Sdn. Bhd. (TCM) was incorporated to carry out the automobile business. The first subscribers and directors were the two brothers.
- e* 5. The food supply business remained with TC & Co.
- f* 6. The automobile business expanded and diversification of the business came into being. TCM went into car rentals, distribution of commercial vehicles and industrial equipment and tour and travel services. There was therefore a necessity to incorporate several companies to accommodate the various businesses.
- g* 7. There was also a regional expansion of the business with the setting up of companies in nearby Singapore as for instance in 1966 the Tan Chong & Sons Motor company (Singapore) Private Limited (TCCS) was established while in 1968 the Singapore Automotive Industries Private Limited (SAI) was acquired.
- h* 8. With the expansion of the business came the involvement of the younger generation of the family to assist the older members in the management.
- i* 9. Then there was the next move to go public but with the caution that the Tan Chong family must continue to be in controlling position.
10. To achieve that plan the family was advised to set up an investment holding company to be a holder of a controlling stake of shares in the company that would be public listed. And it was also planned that only members of the Tan Chong family would be the shareholders of the proposed investment holding company. In effect the Tan Chong family would continue to dominate the intended public listed company.

11. On 4 October 1972 beginning as a private company the Tan Chong Motor Holdings Berhad (TCMH) was established. It became a public listed company on 1 September 1973. With the establishment of TCMH the other companies of the family including TCM were acquired by TCMH. *a*
12. Meanwhile on 7 June 1973 the 9th respondent was set up for the purpose as set out hereinabove. The first subscribers and directors were the 1st petitioner and the late Tan Sri Tan Yuet Foh on the equity ratio of 50:50 respectively. Subsequently this ratio was changed to 44.583:55.417 with Tan Sri Tan Yuet Foh having the larger portion. Now up to this point there is no dispute of facts in this case. However as to what prompted in the change of the ratio is quite contentious depending who is giving the version. *b*
13. To continue with the course of event it would appear from the records of the affairs of the 9th respondent that on 16 June 1973 it resolved to purchase 9,230,000 shares of RM1 each from the shareholders of TCMH before its conversion into a public listed company. The shareholders purchased from were Tan Yuet Foh for 5,111,000 shares and the 1st petitioner for 4,115,000 shares respectively. In turn the 9th respondent in two installments allotted the purchased shares to the respective family members of Tan Yuet Foh and the 1st petitioner with the net result that as at 28.08.1974 the family members of the former were in control of 55.417% of the shares in the 9th respondent while the balance of the shares were with the family members of the 1st petitioner. That ratio remains up to this day. *c*
14. The demise of Tan Sri Tan Yuet Foh on 8 October 1985 saw the passing of leadership in his family to the 1st respondent but the arrangement in the management of the business by the two families remained as before the death save that the key figures of the families were the 1st petitioner and the 1st respondent. *d*
15. Steps were then proposed to reorganize the business structure of the several companies in which the two families had controlling shares through the 9th respondent. One of them was the de-merger exercise of TCMH into three public listed companies each with specialized business activities. But to achieve that goal the participation of the 9th respondent being the largest single shareholder in TCMH was crucial. And it was for the two families to determine being the shareholders in the 9th respondent. *e*
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- a* 16. As to what transpired in order to secure the participation of the 9th respondent the parties herein have diverging versions. And added to that were also the allegations and counter-allegations of the two families as deposed to in the various affidavits filed by both sides particularly in the conduct of their business relationships. We will consider later on in this judgment whether any finding should be made upon any of these charges and counter-charges at the stage of striking out application.

The foregoing is the sequence of events outlining the business foray of the two Tan Chong families which was begun by the patriarch Tan Chong as a humble sole proprietorship.

- c* Now before it is overlooked, it is important to note that the 9th respondent which the petitioners are seeking for an order to wind up is a private limited company. Its only link to the companies aforementioned is that it is a single substantial shareholder in those companies.

d **The Decision Of The High Court**

- In the court below the petitioners raised one preliminary objection to the application of the respondents contending that O. 18 r. 19 of RHC was inapplicable to strike out the petition. But after hearing the respective arguments advanced by learned counsel for the parties the court dismissed the preliminary objection and then proceeded to hear the application proper. The petitioners are appealing against the dismissal of the preliminary objection.

- f* Now in approaching the application proper the learned judge accepted the legal principle that it is a question of fact whether or not to wind up a company and that each case has to be decided on its own particular facts. The learned judge also noted that the petitioners were seeking for equitable relief alleging breakdown in the mutual trust and confidence between the two families whilst the respondents denied such assertion. And the learned judge went on in great details to examine and consider as well as making observations thereto on what were alleged and counter-alleged by the contesting parties hereto.

- g* Further in coming to her decision on the merit of the striking out application the learned judge examined and considered the respective grounds submitted.

- h* There was also a procedural objection to the petition itself raised by the respondents in the striking out application. But there is no appeal against the dismissal of that objection. Hence we are of the view that there is no necessity for us to deal with that part of the decision of the court below.

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In short the gist of the decision of the learned judge is that the petition is an abuse of process and there is no ground shown that satisfy the requirement of just and equitable ground to wind up the 9th respondent.

The Grounds Of Appeal, Contentions Of The Parties And Findings Of The Court

Before us the petitioners submitted 19 grounds against the decision of the court below. But basically the grievances may be summarized into few categories, namely:

- (1) the failure to determine:
 - (a) the source of the jurisdiction when relying on the inherent power to strike out the petition; and
 - (b) that the application of the respondents itself was an abuse of the process of the court;
- (2) that it was not appropriate for finding of facts to be made as the learned judge in this case did in a striking out application;
- (3) that there was a failure to properly consider the ‘just and equitable’ principles as a ground to wind up a company;
- (4) that there was a failure to properly consider the principles of ‘quasi partnership’ based on the historical background and the facts of the case; and
- (5) that there was a failure to properly consider the principles applicable in a striking out application.

The other subsidiary points raised were the assertion that the learned judge took into account irrelevant matters in coming to her decision and the finding of the court that the complaint was only against the 1st respondent and not against the other respondents.

In our view however and subject to our first consideration of whether a striking out application is available or desirable in a company’s winding up petition under s. 218 of the Act, the main question to address should be whether the learned judge in the court below was correct in striking out the petition on the basis as given.

a The Source Of Power To Strike Out The Petition

Before us learned counsel for the petitioners submitted that this court should 'determine and put to rest the issue of applicability of the Rules of the High Court to winding up proceedings'. Such argument included as in the present case the practice of relying on O. 18 r. 19 of RHC to strike out a petition under s. 218 of the Act.

b Now, there are strong views expressed by our courts of the undesirability to adopt a striking out procedure in a winding up petition under s. 218 of the Act since it could cause further delay rather than expedite the disposal of such matter. In the case of *Buildcon-Cimaco Concrete Sdn Bhd v. Filotek Trading Sdn Bhd* [1999] 4 CLJ 135 Abdul Hamid Mohamed J (as he then was) expressed his view in this way at p. 145:

First, are the RHC 1980 not applicable at all?

d The strongest argument against the application of the RHC 1980 is the provision of O. 1 r. 2(2), of the RHC 1980 itself.

e Besides, the Companies (Winding-up) Rules 1972 provides its own scheme of procedure for a s 218 winding-up petition which is more simplified and geared for speedy disposal. RHC 1980, for example, provide for appearance (conditional and unconditional), discoveries, interrogatories, judgment in default of pleading, summary judgment (O. 14), striking out of pleadings (O. 18 r. 19), summons for direction and setting down for trial. Hearing date is only given after the directions made in the summons for direction are complied with and the case has been set down for trial. Perhaps because of these requirements which take some time to be complied since the filing of a writ, that procedures for judgment in default of pleading, summary judgment and the striking out of the writs and pleadings are provided, for quick disposal in clear-cut cases.

f The scheme under the Companies (Winding-up) Rules 1972 is different. When the petition is issued out of court, a hearing date is given straight away. Whatever has to be done, eg service, advertisement, compliance with r. 32, will have to be done before the hearing date. The court is supposed to hear the petition straight away on the date fixed for hearing, the very first time it comes up before it. If everything is done as scheduled, the petition is heard on the date first fixed for hearing. That is what the rules envisage. In the circumstances, there is no necessity for provision for judgment in default, summary judgment or striking out the pleading or trial on issues. I am of the view that that is the reason why the Companies (Winding-up) Rules 1972 do not provide for such procedures. They are not necessary.

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Furthermore, more often than not, resort to O. 18 r. 19 of the RHC 1980 in a winding-up proceedings results in the delay in the hearing of the petition. The application is usually filed one or two weeks before the date fixed for the hearing of the petition. Application is made for it to be heard first, supposedly, to save the court's time. In reality, it delays the hearing of the petition. Whenever there is such an application, inevitably, the hearing of the petition is delayed. Not only will the petition be adjourned for the application to be heard first, but if dismissed, there will be an appeal to the higher court(s).

(See also: *Maril-Rionebel (M) Sdn Bhd & Anor v. Perdana Merchant Bankers Bhd and Other Appeals* [2001] 3 CLJ 248; *Fairview Schools Bhd v. Indrani a/p Rajaratnam & Ors* [1998] 1 CLJ 285 CA).

We find the philosophy implicit in the above statements convincing and adopt it in affirming the view that an application made pursuant to O. 18 r. 19 of the RHC to strike out a petition presented under s. 218 of the Act is undesirable and should be discouraged. In our view the use of that procedure in such winding up proceeding produces only delay in the adjudication of the matter. Of course we are not saying that it is totally inapplicable. There may be an instance where such a petition is obviously unsustainable for want of cause of action or that it is plainly vexatious or frivolous or even an abuse of process. In such a case O. 18 r. 19 could be resorted to. Accordingly we cannot therefore fully accede to the request of learned counsel for the petitioners. In our view the background facts of each case are relevant to determine whether a striking out application is appropriate. For instance in the present case we find that there are matters that cannot be disposed of summarily yet the learned judge in the court below found them as facts. We will elaborate this point later on in this judgment.

And for the same foregoing reason we do not agree with learned counsel for the petitioners that a mere application to strike out a petition under s. 218 of the Act is an abuse of process. Such a ground of appeal has therefore no merit.

On the issue of inherent jurisdiction of the court, we do not think that the failure on the part of the learned judge to indicate the source thereof *ipso facto* a sufficient ground to reverse her decision. In our view such shortcoming in the judgment is similar to a failure to cite the relevant provision of law or rules. And be that as it may the crucial question is whether our courts have the inherent jurisdiction at common law. In our opinion the answer is in the affirmative. Such a view has been continuously upheld by our courts and reaffirmed in the recent case of *Megat Najmuddin bin Dato Seri (Dr) Megat Khas (supra)*. Indeed in that case Steve Shim CJ (Sabah & Sarawak) said, *inter alia* at p. 663:

a In addition, I take the view that the Federal Court also has the inherent jurisdiction under the common law to deal with cases with a view to preventing injustices in limited circumstances. This is clearly in line with s. 3(1)(a) of the Civil Law Act 1956, which was promulgated in accordance with cl. (c) of art. 121(2) of the Constitution which confers on the Federal Court 'such other jurisdiction as may be conferred by or under federal law.'

b Section 3(1)(a) under the heading 'Application of UK Common Law, rules of equity and certain statutes', states as follows:

Save so far as other provision has been made or may hereafter be made by any written law in force in Malaysia, the court shall:

c (a) in West Malaysia or part thereof, apply the common law of England and the rules of equity as administered in England on the 7 April 1956 ...

d Provided always that the said common law, rules of equity and statutes of general application shall be applied so far only as the circumstances of the States of Malaysia and their respective inhabitants permit and subject to such qualification as local circumstances render necessary.

e In 1956, the common law of England clearly recognized the superior courts as having inherent jurisdiction to deal with issues of injustice in certain cases (see *Halsbury's Law of England* (4th edn) vol 37 para 14).

(See also the decision of this court in *Sugumar Balakrishnan v. Pengarah Imigresen Negeri Sabah* [1998] 3 CLJ 85).

f **Findings Of Facts – Just And Equitable And Quasi-Partnership And The Principles Applicable In A Striking Out Application**

To elaborate what we have said earlier on, it is our finding after reading the judgment of the court below that several findings, inferences or conclusions were made which encompassed *inter alia*, the points of whether there was any basis to petition for the winding up of the 9th respondent on just and equitable ground and whether the relationship of the contending parties had been on quasi-partnership.

g In respect of the first point it was the view of the learned judge that:

h (T)he petition which is premised on the 'just and equitable' ground requires this court to examine the petition and affidavits before it, since what is 'just and equitable' in a case must depend on its particular facts.

i Since these expressions are of the widest import, they ought not to be cribbed, cabined and confined by the creation of categories within which a case must be brought in order that it will be held to be 'just and equitable' that a company be wound up.

In other words the learned judge appreciated that findings of facts would be necessary to determine whether there was any justification to wind up the 9th respondent on just and equitable ground. And she proceeded to make some findings namely:

- (1) that the real intention of the petition was to avoid the family of the 1st petitioner from being sidelined in the 'Tan Chong scheme of things' and that the actual complaints of the 1st petitioner were hurled only towards the 1st respondent. And that even those complaints were mere 'domestic skirmishes' insufficient to support any allegation justifying the winding up of the 9th respondent;
- (2) that there was element of bad faith in the petition in that the complaints against the 1st respondent were largely on his conduct or his management of the four public listed companies whereas the proper forum to settle such matters should have been by the companies themselves;
- (3) that the refusal by the 1st petitioner to sign the circular resolution to approve the de-merger of the Tan Chong Group of Companies was an unreasonable conduct in that there was careless disregard to the interests of the other shareholders in those public listed companies as the same would be jeopardized if the de-merger was aborted;
- (4) that the decisions made by the 1st respondent were all matters which were within the legitimate confines in management of a company and there was no evidence to show that the 1st respondent exceeded his powers for some illegitimate or ulterior purpose;
- (5) that the assertion by the petitioners of the break down in the mutual trust and understanding between the two families was weakened by their own admission that they would have no problem working together with the respondents after the split of the shares in the 9th respondent;
- (6) that there was a failure by the petitioners to disclose in the petition that the 1st to the 8th petitioners were and are in senior positions in the various companies of the Tan Chong Group. Such failure amounted to an abuse of process;
- (7) that one reason for filing the petition was to enable the petitioners to unlock their minority position in the 9th respondent;
- (8) that the main issue that upset the petitioners was their inability to outvote the respondents acting collectively and thus in control of the 9th respondent; and

- a* (9) that the court was satisfied that the petition constituted an abuse of process for the grounds relied upon were unsustainable and insufficient to sustain a winding up on just and equitable ground.

- b* With respect, it is our view that these findings are her perceptions of the situation and probably on literal reading of the exhibits annexed to the affidavits filed without the benefit of probable explanations from the contending parties. For instance, it was her own conclusion that the petitioners were afraid of being side-lined in the affairs of the Tan Chong Group. However the point was missed in that it was the assertion of the petitioners that the management was once on a consensus basis. Hence such a conclusion made at an interlocutory application stage should not arise. At any rate the apprehension of being sidelined should rightly be put to the petitioners during the trial proper and not for the learned judge to assume or infer. The other glaring erroneous finding is when it was concluded that the real intention of the petitioners was to unlock their minority position. Obviously such conclusion is derived from the content of para. 103 of the petition. However that paragraph should not be read in isolation. There was an earlier assertion in the petition of how the 5% stake went to the late Tan Sri Tan Yuet Foh and the claim for beneficial shareholding of the same. The respondents disputed such assertion and claim. Hence with such conflict it would not be appropriate and indeed premature for the court below to make any finding or conclusion as it did.
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We also observed that nowhere in her decision did the learned judge point to any part of the petition or affidavits filed in support which she found to have failed to satisfy the requirements of the 'just and equitable' principle. For instance this is what she said:

- f* As the evidence have shown, the 1st Petitioner had harboured feelings of disquiet against the 1st Respondent. This feeling fermented into what appeared to be intense pique even before the 11th September EGM.
- g* The 1st Petitioner's subsequent complaints when viewed in his failed attempt to make 1st Respondent agree to winding up could be seen to be motivated not by the 1st Petitioner's desire to redress the alleged wrongs committed against him and the other Petitioners but by some other reasons best known to himself. As can be seen the catalogue of complaints of the 1st Petitioner were all against the 1st Respondent.
- h* The statement of the 1st Petitioner at paragraph 103 of his petition is most telling. In the light of the family background it suggests several factors. The first if it is his complaints against the 1st Respondent basically stems from the slights (imagined or otherwise) from a brash younger man.

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Secondly, the stirrings of disquiet felt were largely motivated by self-interest and self-preservation and not because there exists a real breakdown of trust and understanding.

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Thirdly, and more importantly, it could be inferred that all the agitations were excited almost entirely because the 1st Petitioner had already harboured an intention to wind up the Company and thus the failure to convince the 1st Respondent to meet him on his term (to restructure and split the shares) seemed to seal the fate of the Company.

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Although the learned judge stated that ‘evidence have shown’ it was not made clear which particular evidence and from which party. And no basis was given for her finding or conclusion of ‘feeling fermented’ within the 1st petitioner. As to what motivated in the filing of the petition the learned judge said that it was not to redress the alleged wrongs but for other reasons best known to the 1st petitioner. Yet no reason was given as to why and how that conclusion was derived at. The learned judge also made a finding that the 1st petitioner was slighted. Obviously that was her own assumption since there was no statement from the 1st petitioner that that was the case. And purely on her own conclusion that there existed no real breakdown of trust and understanding she then went on to conclude that it was for self-preservation and self-interest that the petition was filed. Perhaps it can be summed up that substantially the approach of the court below was to justify a finding by another finding which itself was vague of any evidential basis at the interlocutory stage.

c**d****e**

The learned judge was also quite concerned with the affairs of the public listed companies in which the 9th respondent has interests. However it is only the 9th respondent that will be affected if a winding up order is granted. Thus, the instant case is quite apart from the case of *Tuan Haji Ishak v. Leong Hup Holdings Bhd.* [1996] 1 CLJ 393 where the company involved was a public listed company and one of the factors considered by the Court of Appeal was legitimate expectations in such a company. And no doubt in *Dato’ Ibrahim bin Hj Ismail & Anor v. Onstream Marine Sdn Bhd & Ors* [1998] 4 CLJ 526 it was a private company where the High Court allowed the striking out of the petition. But then again there was no indication that the company was a family company as in the present case or that there was a special arrangement or understanding between the parties involved that could be established. And generally courts are more inclined to characterize companies comprising of family members as belonging to the *Ebrahimi*’s (see: *Ebrahimi v. Westbourne Galleries Ltd* [1973] AC 360) type of companies where the articles of association are not exhaustive or not fully reflective of the terms in the relationships or understanding between the parties. In such cases the courts will invariably subject the exercise of legal rights to equitable considerations so as to give effect the considerations of a personal character between the parties.

f**g****h****i**

a Hence the concept of the ‘bargain’ being cast in the articles of association and which cannot be rewritten by the courts will have to give way. (See: *Re Saul D Harrison & Sons Plc* [1995] 1 BCLC 14). Yet the learned judge in the present case took the view that:

b (T)he 1st petitioner’s maudlin preoccupation with tradition and remembrance of things past gets in the way of the practical, pragmatic corporate governance of the day.

c With respect we are of the view that there was a failure by the court below to consider the true nature or characteristic of the 9th respondent before making such a finding. Moreover it should be remembered that a company, private or public, has its own legal entity. Thus any dispute amongst the shareholders of a holding company should not be assumed as having adverse repercussion on the companies in which it is a shareholder.

d Accordingly it is our view that it was premature or even presumptuous to make the findings, conclusions and inferences as the court below did when it was only at an interlocutory stage.

In respect of the other point this is how the learned judge dealt with it.

e The tenacity of the petitioners in wanting a winding up on account of an irretrievable breakdown of “mutual trust and understanding” between them and the respondents, is diluted, when in the next minute, petitioners were heard to have indicated that they have no problem working together with the respondents after the split.

f This court has difficulty in comprehending this rather perverse logic, since this translates into a situation where there could not possibly be such an irretrievable breakdown, if the parties could still work together.

This brings the matter to another level and that is such being the case there seems to be a collateral purpose and bad faith in the petitioners’ petition.

g In short the learned judge deemed it unnecessary to enquire if there could be any explanation for the apparent contradictions in the stance of the petitioners. In our view it was an inappropriate approach to adopt. Surely the petitioners should be allowed to present their side of the story and to offer an explanation where required. Indeed as intimated earlier on even for the change in the ratio of the shareholdings in the 9th respondent between the brothers, namely the

h 1st petitioner and the late Tan Sri Tan Yuet Foh, has differing versions depending on which family is giving. In our view therefore the learned judge fell into error on this point.

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One other point that is quite disturbing is the purported conclusions or findings that must have been derived from the materials before the learned judge. Obviously she must have evaluated the several affidavits filed. But that approach would then be tantamount to conducting a trial by affidavits which should not be the case. Indeed ‘in the normal way it is not appropriate for a judge to attempt to resolve conflicts of evidence on affidavit’ – (see: *Eng Mee Yong & Ors v. Letchumanan* [1979] 2 MLJ 212). But having said the foregoing we are well aware that it is allowable even at an interlocutory stage for the court to examine affidavit evidence and to come to certain finding where ‘such assertion, denial or dispute is equivocal, or lacking in precision or is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable in itself, then the judge has a duty to reject such assertion or denial, thereby rendering the issue not triable.’ per Mohd. Azmi SCJ at p. 408 in *Bank Negara Malaysia v. Mohd Ismail & Ors* [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14. However it has to be borne in mind as well that the ‘principles upon which the court acts in exercising its power under any of the four limbs of O. 18 r. 19(1) of the RHC are well settled. It is only in plain and obvious cases that recourse should be had to the summary process under this rule (per Lindley MR in *Hubbuck & Sons Ltd v. Wilkinson, Heywood & Clark Ltd* 7), and this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it ‘obviously unsustainable’ (see *AG of Duchy of Lancaster v. L & NW Rly Co* 8). **It cannot be exercised by a minute examination of the documents and facts of the case, in order to see whether the party has a cause of action or a defence** (see *Wenlock v. Moloney & Ors* 9). The authorities further show that if there is a point of law which requires serious discussion, an objection should be taken on the pleadings and the point set down for argument under O. 33 r. 3 (which is in *pari materia* with our O. 33 r. 2 of the RHC) (see *Hubbuck & Sons Ltd v. Wilkinson, Heywood & Clark Ltd* 7). The court must be satisfied that there is no reasonable cause of action or that the claims are frivolous or vexatious or that the defences raised are not arguable.’ per Mohamed Dzaiddin SCJ (as he then was) at p. 43 in *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7 (emphasis added). Although the foregoing principles were stated in relation to an application pursuant to O. 18 r. 19 and not in the exercise of common law inherent jurisdiction, in our view there should be no distinction.

There are other subsidiary points raised by the petitioners in this appeal. However we are of the view that even if we were to deal with them the end results would not be sufficiently material as to alter our decision in this appeal.

- a* For the above reasons we are inclined to agree with the contention of learned counsel for the petitioners that the decision of the court below should not be allowed to stand and we hereby set it aside. As such this appeal is allowed with costs here and below to be taxed. Deposit paid for this appeal to be refunded to the petitioners. Subject to further appeal this matter should be
- b* returned to the court below for fixture of trial date as soon as possible before another judge.
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